Supreme Court, U.S.
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No. 95-1214

In The

Supreme Court of the United States

October Term, 1995

SAM FELDT,

Cross-Petitioner,

v.

MENTOR CORPORATION,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CROSS-RESPONDENT IN RESPECT OF THE CONDITIONAL CROSS-PETITION

MICHAEL CONNELLY
EARNEST WOTRING
MAYOR, DAY, CALDWELL & KEETON
700 Louisiana, Suite 1900
Houston, TX 70022
Telephone: (713) 225-7000
Facsimile: (713) 225-7047

GEORGE A. CUMMING, JR.
Counsel of Record
THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON LLP
One Market, Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-0900
Facsimile: (415) 442-1010

Attorneys for Petitioner and Cross-Respondent

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OR CALL COLLECT (402) 342-2831

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QUESTION RESTATED

Do the Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. § 360c *et seq.*, preempt state law claims that allege that the plaintiff was injured by a medical device that lacked an adequate warning?

BRIEF FOR CROSS-RESPONDENT IN RESPECT OF THE CONDITIONAL CROSS-PETITION

On January 19, 1996, this Court granted certiorari in *Lohr v. Medtronic, Inc.*, 56 F.3d 1335 (C.A.11 1995), *cert. granted*, Nos. 95-754 and 95-886. *Lohr* presents, among other issues, whether state law claims for negligence and strict liability are preempted by federal law when the plaintiff alleges injury caused by a manufacturer's failure to warn about a medical device.

Similarly, the conditional cross-petition in this case asks the Court to decide whether the Medical Device Amendments to the Food, Drug and Cosmetic Act (21 U.S.C. § 360c, *et seq.*) preempt claims asserting liability under state law for a failure to warn about a medical device that allegedly caused injury.[1] In this case, the Fifth Circuit found preempted state law claims based on negligence, strict liability, implied warranty, and the Texas deceptive trade practices act. Each such preempted claim rested on the assertion of a failure to warn about the medical device at issue.

Thus, there appears to be either similarity or overlap between some of the issues before the Court in *Lohr* and some of the issues presented by the conditional cross-petition.

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[1] The question presented by the cross-petition is inartfully broad, referring to preemption of "state-law claims" without precision or differentiation. However, as the petition makes clear (at p. 1) the specific preempted claims at issue in this case are each premised on the theory of a failure to warn about the medical device at issue.

DATED: February 26, 1996.

Respectfully submitted,

GEORGE A. CUMMING, JR.
Counsel of Record
THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON LLP

MICHAEL CONNELLY
EARNEST WOTRING
MAYOR, DAY, CALDWELL & KEETON

Attorneys for Petitioner and Cross-Respondent